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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 286

SINCLAIR REFINING COMPANY,
Appellant,

vs.

STATE OF LOUISIANA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

E. LELAND RICHARDSON,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction and motion to dismiss	1
Nature of the suit	1
Grounds upon which appellant seeks to invoke jurisdiction of this Court	3
Procedural statute	4
Appellant attempts to raise substantial Federal questions by now alleging surprise at the decision rendered by the Supreme Court of Louisiana	14
Conclusion	16

Table of Cases Cited.

Commonwealth of Massachusetts v. *Mellon*, 262 U. S. 447, 43 Sup. Ct. 597	11
Equitable Life Assurance Society of the United States v. *Brown*, 187 U. S. 308, 23 Sup. Ct. 123	12
Hardware Dealers' Mutual Fire Insurance Co. v. *Glidden Co.*, 284 U. S. 151, 52 Sup. Ct. 69	10
New Orleans, etc., R. R. Company v. *State of Louisiana ex rel. City of New Orleans*, 157 U. S. 219, 15 Sup. Ct. 581, 39 L. Ed. 679	9
Premier-Pabst Sales Company v. *Grosscup*, 298 U. S. 226, 56 Sup. Ct. 754	11
State v. *Great Atlantic & Pacific Tea Company*, 190 La. 925, 183 So. 219, 59 Sup. Ct. 108	14
State v. *Standard Oil Company of Louisiana*, 188 La. 978, 178 So. 601	3, 7

Statutes Cited.

Act 14 of the Second Extra Session of the Louisiana Legislature for 1935	3, 4, 5, 6, 8
Constitution of Louisiana of 1921, Article I:	
Section 2	4, 5
Section 6	4, 5
Constitution of the United States, 14th Amendment	4
C. J. S. "Constitutional Law", Volume 16, Section 612	11

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STATEMENT OF THE APPELLEE MAKING AGAINST THE JURISDICTION OF THE COURT AS IS PROVIDED FOR IN RULE 12, PARAGRAPH 3 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

The State of Louisiana, appellee, hereby submits the following statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States is without jurisdiction upon appeal to review the judgment in question.

I.

Nature of the Suit.

The State of Louisiana filed suit against the Sinclair Refining Company, appellant, to collect additional gasoline

taxes, interest and penalties due the State (R. 7-26) under Louisiana Statutes enumerated in the petition (R. 8).

Appellant is a dealer in gasoline, and other petroleum products in Louisiana (R. 7, 42). It operates a terminal at Westwego, Louisiana (R. 109). Appellant brought gasoline into Louisiana to its Westwego terminal. The only question involved in this case on the merits from the very beginning is the method that must be used in measuring the gasoline brought into Louisiana by appellant for Louisiana tax purposes.

The Supreme Court of Louisiana, in its opinion in the case at bar, stated the question involved on the merits, as follows (see typewritten opinion, page 6):

> "The main issue involved is whether the defendant is due the amount of tax on gasoline which the State claims. Whether it is due the State the amount claimed depends upon the question whether or not the dealer must pay the tax on the total quantity of gasoline manufactured or imported into the state for sale, use, or consumption therein, less the statutory 3 per cent deduction for losses in handling, or whether he is required to pay the tax on the amount of gasoline actually sold, used, or consumed, less the statutory 3 per cent to cover his losses in handling. Counsel for the State say in their brief that the short question the court is called upon to answer is this:
>
> 'Does the Gasoline Tax Law (Act 6 E. S. 1928, as amended, and Act 1 Extra Session 1930) authorize the dealer to deduct for stock losses or evaporation in addition to the 3% allowance provided by the statute to cover 'losses in handling'? What losses does the phrase 'losses in handling' include and cover?' "

The only question involved in this case on the merits from the inception of the litigation has been whether or not the additional taxes claimed in appellee's petition are due the State (R. 7-53). To decide this question simply requires an

application of the Louisiana Gasoline Tax Statutes, referred to hereinabove, under which the State claimed the additional taxes. As a matter of fact, the Supreme Court of Louisiana said in the opinion in the case at bar that it thought it had made itself clear in a previous decision on the very point involved in the instant case, citing *State* v. *Standard Oil Company of Louisiana*, 188 La. 978, 178 So. 601. This point is emphasized for the reason that appellant is now attempting to raise a Federal question and is endeavoring to invoke the jurisdiction of this Court on a theory not urged in the District court where the case was first tried, and not raised by the pleadings, but was raised for the first time on an application for rehearing in the Supreme Court of Louisiana. Appellant now contends that the decision of the Supreme Court of Louisiana in this case took appellant by "surprise", and it was only at that time that it could raise the Federal question.

The Federal question sought to be injected into the case on rehearing in the Supreme Court of Louisiana, and on which appellant largely depends now to invoke the jurisdiction of this Court, is that some of the tax involved in the litigation, and for which the Supreme Court of Louisiana has given judgment to the State, is a direct burden on interstate commerce and is in violation of the commerce clause of the Constitution of the United States.

II.

Grounds Upon Which Appellant Seeks to Invoke Jurisdiction of This Court.

Appellant endeavors to invoke the jurisdiction of this Court in this case on two theories:

1. Appellant endeavors to attack Act 14 of the Second Extra Session of 1935 of the State of Louisiana, which pro-

vides an additional procedure to facilitate and expedite the determination and trial of all claims by and on behalf of the State of Louisiana for taxes.

2. Appellant takes the position that the decision of the Supreme Court of Louisiana in the instant case, which held the taxes due the State as claimed in the State's petition and prayer, took it by surprise, and that it could not foresee that the decision would be adverse to it in the Supreme Court of Louisiana; that it was not until the decision was adverse to it that it discovered that its position would be that part of the tax claimed by the State in the original petition and prayer was a direct and prohibited burden on interstate commerce.

III.

Procedural Statute.

In an attempt to raise a substantial Federal question, appellant attacks the constitutionality of Act 14 of the Second Extra Session of the Louisiana Legislature for 1935, under which the State filed the proceedings in the case at bar (R. 27). This procedural statute provides an additional method for the collection of taxes, excises, licenses and penalties. Appellant alleges said procedural statute is objectionable in that it deprives it of due process and equal protection of the law in violation of

(a) The Fourteenth Amendment to the Constitution of the United States, which reads, in part, as follows:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Sections 2 and 6 of Article I of the Constitution of the State of Louisiana for the year 1921, which reads as follows:

"Section 2. No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

"Section 6. All courts shall be open, and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay."

Appellant alleges that Act 14 of the Second Extra Session of 1935 is coercive and deprives it of due process and equal protection of the law because it contains the following provisions:

(a) Proceedings are summary;

(b) The cause shall be heard in not less than two nor more than ten days;

(c) All pleadings must be filed before hearing;

(d) No continuances shall be granted except for legal causes, and

(e) Denies the right of devolutive appeal, and suspensive appeal is conditional.

For the purpose of the aforementioned objections, the following facts are pertinent: This cause was filed December 31, 1938 (R. 7); the order of the district court required appellant to answer on the tenth day of January, 1939 (R. 17), and on that date appellant filed six exceptions (R. 27-41), and its answer (R. 42-53), and upon consent of counsel, a continuance was granted (R. 1), and the case refixed for trial on January 24, 1939 (R. 1). The case was heard by the district court on January 24 and 25, 1939 (R. 103). A subpœna *duces tecum* issued in the case on appli-

cation of appellant, and was satisfied by appellee on January 24, 1939 (R. 1). The case was argued on March 16, 1939 (R. 2), at which time the court overruled the six exceptions filed by appellant, including the exception attacking the procedural act as unconstitutional (R. 2).

On March 16, 1939, counsel was allowed fifteen days from that date within which to file briefs, after which the case would be taken under advisement by the Court (R. 3). The district court rendered its opinion in the case on the merits April 24, 1939 (R. 3). A suspensive appeal was granted the defendant by the district to the Supreme Court of Louisiana, on April 27, 1939 (R. 5), with the return date fixed for May 9, 1939 (R. 6). The transcript was filed in the Supreme Court of Louisiana on May 9, 1939 (see cover of transcript), and from an adverse decision of the Supreme Court of Louisiana, appellant seeks to invoke the jurisdiction of this Court.

The entire record in this case conclusively shows that appellant was afforded an adequate, complete and thorough hearing in the Courts of Louisiana. Its claim, therefore, that it has been deprived of equal protection of the law and due process of law under the Fourteenth Amendment to the Constitution of the United States is without foundation in fact. There is not one scintilla of evidence in the entire record that in any way indicates that appellant has been or is about to be deprived of its property without due process of law, nor is there any evidence indicating a denial of the equal protection of the law. To the contrary, a full, adequate and complete hearing in a judicial proceeding has been afforded appellant under the provisions of Act 14 of the Second Extra Session of 1935.

The mere allegation contained in the exception filed by appellant in this case attacking the constitutionality of the procedural statute is not sufficient of itself to raise a sub-

stantial Federal question. It is incumbent upon appellant to conclusively show wherein it has been actually deprived of the equal protection of the law or of due process of law. In this appellant has utterly failed. In fact, there is nothing in the record to show that appellant has even attempted to prove or to show by evidence that it has been deprived of equal protection of the law or due process of law. In affirming the ruling of the district court in the case at bar, sustaining the constitutionality of the procedural statute, the Supreme Court of Louisiana states (Typewritten opinion, page 4):

> "We shall not discuss the ruling of the trial judge holding that Act 14 of the Second Extra Session of 1935 is constitutional further than to say that his ruling was correct. The attacks made on the validity of that Act in this case are the same, or practically the same, as those made in the case of State of Louisiana *v.* Standard Oil Company of Louisiana, 188 La. 978, 178 So. 601, where it was held that the Act is constitutional. We adhere to our holding in that case that the statute is constitutional."

The Supreme Court of Louisiana, in the case of *State of Louisiana* v. *Standard Oil Company of Louisiana,* 188 La. 978, 178 So. 601, in holding Act 14 of the Second Extra Session of 1935 constitutional, said:

> "• • • The court does not think that the provisions of the act above referred to, under the circumstances of the case, operate or serve to deprive defendant of a fair and impartial trial, or denies to it that hearing or day in court to which it is entitled, or denies any of the privileges granted by the Constitution. Taking into consideration the fact that the Statute is a tax measure and intended to facilitate the state in the collection of its revenues, the Court is of the opinion that the defendant has had a reasonable

time within which to prepare and submit its defenses. * * *." (188 La. 1015.)

* * * * * * *

"'The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend.' Louisville, etc., R. Co. *v.* Schmidt, Ky. 1900, 177 U. S. 230, 20 S. Ct. 620, 44 L. Ed. 747; Illinois Cent. R. Co. *v.* Paducah Brewery Co., 1914, 157 Ky. 357, 163, S. W. 239." (188 La. 1021.)

* * * * * * *

"These facts considered in reference to the opinion expressed by the various courts in the cases cited above strengthen the conviction and opinion of this court that Act No. 14 affords and gives all defendants ample and sufficient notice and opportunity to be heard and that the 'due process of law' and the 'equal protection of law' clauses in either constitution are not violated or encroached upon." (188 La. 1025.)

Appellant also objects to the Louisiana Legislature, by Act 14 of the Second Extra Session of 1935, giving the Collector of Revenue of Louisiana the privilege of choosing the judicial procedure he may use for the purpose of collecting taxes. Appellant claims that this deprives it of equal protection of the law and of its property without due process of law. This contention is entirely without merit. In rejecting the same position taken by one of the litigants in the case of *State* v. *Standard Oil Company, supra,* the Supreme Court of Louisiana says:

"'The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.' Brown *v.* New Jersey, N. J. 1899, 175 U. S. 172, 175, 20 S. Ct. 77, 78, 44 L. Ed. 119.

"'A state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto provided that substance of right is secured without unreasonable burden to parties and litigants.' York *v.* Texas, Tex. 1890, 137 U. S. 15, 20, 11 S. Ct. 9, 10, 34 L. Ed. 604.

"'When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.' Jordan *v.* Massachusetts, Mass. 1912, 225 U. S. 167, 32 S. Ct. 651, 652, 56 L. Ed. 1038." (188 La. 1017-1018.)

* * * * * * *

"A careful reading and analysis of these cases leaves the Court with the opinion that the Legislature acted well within its authority when it passed the Act in question." (188 La. 1018.)

There can be no valid objection interposed to the Legislature of Louisiana providing several different judicial procedures for the collection of taxes, so long as due process of law under each method is provided. The State may provide any mode of procedure for its own courts, so long as due process of law under the Federal Constitution is not denied. *New Orleans, etc. R. R. Company* v. *State of Louisiana ex rel.* City of New Orleans, 157 U. S. 219, 15 S. Ct. 581, 39 L. Ed. 679. In the case cited, this Court said:

"* * * Modes of procedure in the courts of a state are so far within its control that a particular

remedy existing at the time of the making of a contract may be abrogated altogether, without impairing the obligation of the contract, if another and equally adequate remedy for the enforcement of that obligation remains, or is substituted for the one taken away Bronson *v.* Kenzie, 1 How. 311, 315; Von Hoffman *v.* Gunney, 4 Wall. 552; Insurance Co. *v.* Cushman, 108 U. S. 64, 2 Sup. Ct. 236; McGahey *v.* Virginia, 135 U. S. 693, 10 Sup. Ct. 972. Much more may the state give an additional and more efficacious remedy for the enforcement of contracts in the performance of which the public health and the public safety are involved, provided, always, that the new remedy is consistent with the nature of the obligation to be enforced, and does not impair any substantial right given by the contract. One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is designed only to enforce preformances of his obligation."

In the case of *Hardware Dealers' Mutual Fire Insurance Company* v. *Glidden Co.*, 284 U. S. 151, 52 S. Ct. 69, this Court, in stating that the procedure by which rights may be enforced and wrongs remedied is peculiarly within State regulation and control, said:

"The present statute substitutes a determination by arbitration for trial in court of the single issue of the amount of loss suffered under a fire insurance policy. As appellant's objection to it is directed specifically to the power of the state to substitute the one remedy for the other, rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See *Missouri ex*

rel. Hurtwitz v. *North*, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 818. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

Further, the rule is that while the requirements of due process apply in respect of special or summary proceedings, the mere fact that the proceeding is special or summary in character does not, of itself, militate against the presence of due process of law. 16 C. J. S. Constitutional Law, Section 612.

It is well established that the constitutionality of a statute may not be successfully attacked by one whose rights are not adversely affected by the operation of the statute.

A constitutional question may not be raised by one whose rights are not directly and certainly affected. This Court, in the case of *Commonwealth of Massachusetts* v. *Mellon*, 43 S. Ct. 597, 262 U. S. 447, said:

> "• • •. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained, or is in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

This Court, on the question of who has the right to attack the constitutionality of a State statute, in the case of *Premier-Pabst Sales Company* v. *Grosscup*, 298 U. S. 226, 56 S. Ct. 754, said:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down

> a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him. Heald *v.* District of Columbia, 259 U. S. 114, 123, 42 S. Ct. 434, 66 L. Ed. 852."

The jurisprudence above cited could be supplemented by many other cases, but we deem it unnecessary.

In the case at bar, the appellant has simply made a general attack on the constitutionality of the act under which the State proceeded to collect from it State taxes, and nowhere in the record is there one scintilla of evidence to prove that in the proceeding involved appellant has been deprived of due process of law in the courts of Louisiana, or of equal protection of the laws.

The simple allegation that a State statute violates some provision of the Constitution of the United States, or a simple allegation of this type for the purpose of raising a Federal question, is not sufficient. This Court, in the case of *Equitable Life Assurance Society of the United States* v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, said:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this Court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 345, 46 L. Ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited. The power, however, to dis-

miss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject-matter of the controversy is per se and inherently Federal. Swafford *v.* Templeton, 185 U. S. 487, 493, 46 L. Ed. 1005, 1008, 22 Sup. Ct. Rep. 783. It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject. Chanute *v.* Trader, 132 U. S. 210, 33 L. Ed. 345, 10 Sup. Ct. Rep. 67; Richardson *v.* Louisville & N. R. Co., 169 U. S. 128, 42 L. Ed. 687, 18 Sup. Ct. Rep. 268; Blythe *v.* Hinckley, 180 U. S. 338, 45 L. Ed. 561, 21 Sup. Ct. Rep. 390."

For the reasons assigned, we submit, with respect, that appellant has utterly failed to show wherein Act 14 of the Second Extra Session of 1935 has deprived it of its property without due process of law or has deprived it of equal protection of the law, and, further, we submit that the simple allegations attacking the constitutionality of said Act, without more, are entirely insufficient, under the law, to raise a substantial Federal question, and that, insofar as this phase of the case is concerned, appellant has failed to raise a substantial Federal question, and that this Honorable Court is without jurisdiction in the premises, and that the appeal herein should be dismissed.

IV.

Appellant Attempts to Raise Substantial Federal Question by Now Alleging Surprise at the Decision Rendered by the Supreme Court of Louisiana.

In this proceeding, the State of Louisiana has brought suit against one of its local gasoline dealers, the Sinclair Refining Company, alleging, in its petition, that the dealer brought into Louisiana gasoline on which it had not paid the Louisiana gasoline taxes.

The sole question in the case was whether or not gasoline taxes claimed by the State are due by the dealer, appellant. The question of whether or not the taxes are due involved an interpretation of the Louisiana Gasoline Tax Statutes. It was apparent to both parties to the suit, as conclusively shown by the petition and answer, what the issues were between the parties litigant.

The Supreme Court of Louisiana finally rendered an opinion giving judgment to the State. After this opinion was rendered by the Supreme Court of Louisiana, based on the petition and answer, and giving judgment in favor of the State, appellant applied for a rehearing in the Supreme Court of Louisiana. At this point appellant sought to inject into the proceedings a constitutional issue not urged in the pleadings, and raised for the first time in the application for rehearing.

The jurisprudence in Louisiana is well established that issues not raised by the pleadings are not properly before the court and cannot be considered on appeal. The Louisiana Supreme Court in the case of *State* v. *Great Atlantic & Pacific Tea Company*, 190 La. 925, 183 So. 219, writ of certiorari denied, 59 Sup. Ct. 108, said:

> "It is elementary that 'he who urges the unconstitutionality of a law must specially plead its unconstitutionality, and show specifically wherein it is uncon-

stitutional' (City of Shreveport *v.* Pedro, 170 La. 351 127 So. 865; see also Ward *v.* Leche, Governor, 189 La. 113, 179 So. 52), and that issues not raised by the pleadings are not properly before the court and can not be considered on appeal. Montgomery *v.* Barrow, 19 La. Ann. 169; Succession of Rhodes, 39 L. Ann. 473, 2 So. 36; State ex rel. Neyland *v.* Read, 50 La. Ann. 445, 23 So. 715; Neith Lodge *v.* Vodernbaumen, 111 La. 213, 35 So. 524; Cunningham *v.* Penn Bridge Co., 131 La. 196, 59 So. 119; Godchaux Sugars, Inc., *v.* Boudreaux & Bros., 153 La. 685, 96 So. 532; Clarke Co. *v.* Petivan, 161 La. 1095, 109 So. 913; Woodward, Wight & Co. v. National Box Co., 168 La. 701, 702, 123 So. 296; Succession of Price, 172 La. 606, 134 So. 907."

It is evident that, under Louisiana practice, appellant had no right to attempt to inject an issue in the present proceedings for the first time on rehearing in the Supreme Court of Louisiana. Appellant, however, attempts to raise a substantial Federal question by pleading "surprise" at the outcome of the decision of the Supreme Court of Louisiana, which simply held the taxes claimed in the State's petition were due the State by the dealer.

We submit, with respect, that appellant is entirely without the right to attempt to raise a substantial Federal question by attempting to inject the issue for the first time in an application for rehearing in the Louisiana Supreme Court, when the issues between the parties litigant were definitely apparent when the case was tried in the District Court.

Appellant now, for the first time, on application for rehearing takes the position that some of the taxes claimed by the State are a direct burden on interstate commerce. If these taxes are a direct burden on interstate commerce now, and we submit, with respect, that they are not, they were at the time the State filed the original petition claiming the taxes due. Appellant, not having raised the issue at that time, we submit, with respect, that under the law, appellant

is without authority to raise the issue for the first time in an application for rehearing in the Supreme Court of Louisiana. As a matter of fact, the Supreme Court of Louisiana, in the decision in the case at bar, specifically stated that the court was of the opinion that the issues involved in the instant case had been previously decided by the case of State *v.* Standard Oil Company of Louisiana, *supra*, but that because of further litigation, the court had evidently not made itself clear.

For the reasons assigned, we, with respect, submit that appellant has failed to raise a substantial Federal question in its application for rehearing in the Supreme Court of Louisiana.

V.

Conclusion.

We submit, with respect, for the reasons set out above, that the appeal taken to this Honorable Court from the Supreme Court of Louisiana in the instant case should be dismissed at appellant's cost, and we so move its dismissal.

E. Leland Richardson,
Attorney for Appellee.